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tenue le lundi 8 avril 1991, à 10 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, Président

en l'affaire relative à la Sentence arbitrale du 31 juillet 1989

(Guinée-Bissau c. Sénégal)

COMPTE RENDU

YEAR 1991

Public sitting

held on Monday 8 April 1991, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case concerning the Arbitral Award of 31 July 1989

(Guinea-Bissau v. Senegal)

VERBATIM RECORD

Présents:

Sir Robert Jennings, Président
M. Oda, Vice-Président
MM. Lachs
Elias
Ago
Schwebel
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ranjeva, Juges
MM. Mbaye
Thierry, Juges *ad hoc*

M. Valencia-Ospina, Greffier

Present:

President Sir Robert Jennings
Vice-President Oda
Judges Lachs
Elias
Ago
Schwebel
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ranjeva
Judges *ad hoc* Mbaye
Thierry

Registrar Valencia-Ospina

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comme coagent;

Mme Monique Chemillier-Gendreau, professeur à l'Université de Paris VII,

M. Miguel Galvao Teles, avocat et ancien membre du Conseil d'Etat,

M. Keith Highet, professeur adjoint de droit international à la Fletcher School de droit et diplomatie et membre des barreaux de New York et du District de Columbia,

M. Charalambos Apostolidis, maître de conférences à l'Université de Bourgogne,

M. Paulo Canelas de Castro, assistant à la faculté de droit de l'Université de Coimbra,

M. Michael B. Froman, Harvard Law School,

comme conseils;

M. Mario Lopes, procureur général de la République,

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comme conseillers.

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Mrs. Monique Chemillier-Gendreau, Professor at the University of Paris VII,

Mr. Miguel Galvao Teles, Advocate and former Member of the Council of State,

Mr. Keith Highet, Adjunct Professor of International Law at The Fletcher School of Law and Diplomacy and Member of the Bars of New York and the District of Columbia,

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Mr. Michael B. Froman, Harvard Law School,

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as counsel.

The PRESIDENT: Please be seated. Dr. Bowett, please.

Mr. BOWETT: Mr. President, I turn now to the second part of my pleading. I shall here deal with the contention by Guinea-Bissau that the Award of 31 July 1989 is "inexistent".

Let me first recall what Guinea-Bissau argues. In essence, it is this: that a valid award required the concurrent will of two arbitrators; that such a will - the requisite majority, if you like - did not exist in this case; that in consequence no valid award exists; and that this defect, leading to "inexistence", is prior to and different from the defects in reasoning which are an excès de pouvoir and lead to nullity rather than "inexistence". I hope that is a fair summary of Guinea-Bissau's case.

This argument raises two quite different questions. The first is a quite general question, namely is the concept of a juridically "inexistent" act appropriate to an arbitral award? The second is a question specific to this case, namely was there a majority in support of this award or not?

I start with the general question.

1. Is the concept of an "inexistent" act appropriate to an arbitral award?

In my submission this is an important question, and the Court's judgment on this question may have far-reaching consequences for arbitral settlement and the binding force of arbitral awards.

Let me begin by saying that, of course, one can see the difference which lies at the heart of Guinea-Bissau's argument. This is the difference between a defect which precludes a valid award from even coming into existence, and defect within an award which certainly exists, even though defective. Take an arbitral award which under the compromis requires the signed support of two of three arbitrators. Clearly, if the award is signed by only one arbitrator, or perhaps by the Registrar alone, there is no valid award. That is abundantly clear. It is what we might call in the common law "an error on the face of the record". Of its invalidity there is no doubt. The only doubt is whether we should term it "invalid", or a "nullity", or an "absolute nullity", or "inexistent".

Let me contrast with that type of obvious defect a case - such as the present case - where the required majority of two arbitrators has subscribed to the award, but one Party alleges that the majority is only apparent, and does not exist in substance. This will raise very much more

complicated issues, involving an analysis of the compromis and of the Award, but can it be treated as essentially the same question? A question of "inexistence"?

Before we answer that question, I think it is necessary to recognize that, in the doctrine, the notion of an "inexistent" act is not confined to the rather simple case that I have used, namely whether there is, or is not, a majority. If I may recall to the Court the views of Guggenheim in his Hague lectures in 1949 on "La validité et la nullité des actes juridiques internationaux" (*RCADI*, Vol 74, p. 205), he posed four conditions for a not inexistent, or valid, act; "un sujet capable, un objet approprié, une volonté réelle, et des formes convenables".

So for Guggenheim at least, the matter is much more complex. Guggenheim was, of course, speaking of international acts in quite general terms, not of arbitral awards in particular. But is perhaps useful to try to apply his four conditions to an arbitral award. "Inexistence" can arise from the act being performed by a person with no legal capacity to act: that would be my example of an award being signed by the Registrar alone. Or it can arise from the object, or aim, of the act being inappropriate: that sounds rather like a *détournement de pouvoir*, an abuse of power. Or from the lack of any genuine will: I suppose an arbitrator suffering from coercion, or insanity, would illustrate that. Or from the fact that the act was not in the required form.

From this we can draw a fairly clear conclusion. The distinction which Guinea-Bissau urges on us - and which I admitted is perfectly possible to see in a simple case - becomes less and less easy to draw in practice. When you have regard to the whole range of defects which, according to some writers, would lead to "inexistence", the borderline between inexistence and nullity becomes very blurred indeed! And certainly we are dealing with a distinction which is not only difficult to draw, but perhaps very dangerous if it is intended to have legal consequences.

That is perhaps the more important question. If there is such a distinction, what consequences does it have? Presumably these consequences will exist either for the parties to the award, or for a court or tribunal reviewing the status of the award. Let me treat these separately.

(a) The consequences of a distinction between an "inexistent" award and an "annulable" award for the Parties

I believe the first question that arises is the following.

(i) Can an "inexistent" award be unilaterally so determined by a Party?

Guinea-Bissau's Memorial contains the clearest possible hints that, in its view, one consequence of the Award being "inexistent" is that it could be so declared by Guinea-Bissau *without any obligation to have recourse to this Court or to any other international tribunal*. There can be no other interpretation of paragraph 72 of the Guinea-Bissau Memorial.

In my submission it would be catastrophic if the Court were to allow this view to pass unchallenged. We have to start from the premise that States are not generally bound to accept some form of compulsory, third-party settlement in relation to the existence or inexistence of an arbitral award. This case is rather exceptional, in that the terms of this question happened to fall within the terms of the optional clause declarations of the two Parties. But, normally, once an arbitral award is rendered, compliance with the award rests with the Parties and no Court or Tribunal exists with competence to resolve a dispute over the existence of the award.

Now that being the case, what happens to the cardinal principle of arbitration, that an award is final and binding? A Party disappointed by the award would be free to declare the award "inexistent", and that would be the end of the matter. As Senegal has explained in its Counter-Memorial (at pp. 21-22), this view would be fundamentally disruptive of the international legal order in the matter of arbitral awards. The disappointed Party, by unilateral decision, could in effect set aside the award; and the award would not be worth the paper it was written on.

So, in my submission, the Court must rule that this view is unacceptable. Of course, it cannot impose a duty to refer to third Party settlement - as was the aim of the Finnish proposals to the League of Nations in 1929, or George Scelle's draft on Arbitral Procedure in 1958. But the Court can hold that, in relation to an arbitral award, this theory of "inexistence" is unacceptable and that, while there may be a dispute over the validity of the award, the matter is not to be resolved by one Party declaring the award to be "inexistent".

(ii) If not, what is the legal status of the award, given that a dispute over its validity exists?

Of course, that leaves us with the following question. What is the legal position, given that

such a dispute exists? As to this, the answer must surely be that a Party is entitled to rely on the validity of an arbitral award until such time as the other Party, which disputes the validity of the award, is able to satisfy an impartial third-party that the award is, in truth, invalid.

This is the presumption of validity which necessarily attaches to an arbitral award. In my submission, whether one speaks of a judicial decision or an arbitral award, all legal systems must operate on the basis that a judicial decision or arbitral award is, prima facie, to be deemed valid. Indeed, a legal system could scarcely operate on any other basis: as Balasko said in 1938 - *"La validité de la sentence se présume"* (*Causes de nullité de la sentence arbitrale en droit international public*, 1938, p. 201).

It is this basis which the International Court itself has acted upon in the *King of Spain* case, *I.C.J. Reports 1960,* page 192, for the Court clearly placed the burden of proving that the award was *invalid* on Nicaragua, and thus applied a presumption of validity.

On Thursday last we heard a brave - one might even say an audacious, attempt by Mr. Highet to reverse this burden of proof. He argued (CR 91/3, pp. 85-87) that in cases where the Award is patently flawed by an absence of reasoning it should be for the Party seeking to uphold the award to prove that it should not be nullified. That really will not do, Mr. President. We cannot assume from the outset that the award is patently flawed: whether the award was adequately reasoned is the issue to be decided. It is quite impossible to reverse the burden of proof by presupposing that the award is defective. So we must proceed on the basis that the award is presumed to be valid, until the contrary is proved. So the burden must rest with Guinea-Bissau in this case.

It is because of this presumption of validity that a Court seised with jurisdiction to annul an award is given power to suspend the execution of the award, as an interim measure. In Senegal's Counter-Memorial, paragraph 60, we have cited examples of this power. But, obviously, the existence of this power presupposes that, without an order to suspend execution, the successful Party is entitled to execution. And that entitlement to execution presupposes, in turn, that the award is, and remains, valid until it is successfully challenged.

It is equally clear that, by failing to challenge an award over many years a Party loses that

right of challenge: that was essentially the position in the case of the *Arbitral Award Made by the King of Spain, I.C.J. Reports 1960,* page 192. Nicaragua was precluded from challenging the award after remaining inactive for several years.

It therefore follows that if an award can be executed, unless a Court orders suspension of execution; and if an award ceases to be subject to a challenge after a lapse of time, we are not dealing with a *non-existent* juridical act. We are dealing with an act which is more properly described as *voidable*, an act subject to invalidation. In other words, in relation to arbitral awards there will rarely, if ever, be a place for any strict notion of inexistence or absolute nullity. The simple dichotomy between inexistent acts and valid acts is too simple, and essentially unworkable, in relation to arbitral awards.

Now it may be said that in international law the presumption of validity cannot operate, because it presupposes that the unsuccessful Party has not only a right of challenge, but also a means - a procedure - for challenge; and this procedure cannot be guaranteed given the absence of compulsory, third-party settlement.

Mr. President, I would not dispute the disadvantages of a system which lacks compulsory third-party settlement. But I do not think this objection is fatal to my thesis. For the presumption of validity is just that - a presumption, and no more. As a consequence, where procedures for challenging exist, a Party challenging an award must use those procedures or drop his challenge. But if there are no compulsory procedures, the Party challenging an award is always entitled to propose third-party settlement of the dispute over the validity of the award. And if the other Party refuses to accept that proposal, refuses to come to this Court or to refer to further independent arbitration in order to settle the dispute over the validity of the award, then, in my view, the Party proposing reference to third-party settlement is entitled to say the presumption of validity can no longer be invoked. No third-party settlement of the dispute - no benefit of the presumption of validity. That, in my submission, would be the way to give coherence to the system consistent with the aim of third-party settlement of disputes between States, but recognizing nonetheless that such third-party settlement depends on consent.

So much for the consequences for the Parties themselves. As I said earlier, there is a further question: that of the consequences of the supposed distinction between an "inexistent" and an "annulable" award for a court or tribunal seized with the question of validity. So I turn now to this question.

(b) The consequences of a distinction between an "inexistent" award and an "annulable" award for a court or tribunal seized with the question of validity

The Parties are, I think, in agreement that a judgment by this Court, holding the arbitral award to be invalid, would be purely "declaratory". Unlike more sophisticated, national legal systems with an established judicial hierarchy, such a judgment would not, of itself, have executive effect on the Arbitral Award. It would not "eradicate" the award, like a true *recours en annulation*, but rather would declare it to be invalid - leaving it to the Parties to take whatever measures are necessary to put this into effect.

Mr. President, I do not see how this affects - one way or the other - the question whether the award is "inexistent". The Court can perfectly well carry out the task Guinea-Bissau seeks to impose on it by declaring the award to be a nullity, or to be invalid. The notion of an "inexistent" award is quite superfluous, and so my submission is that this distinction, for which Guinea-Bissau argues, has no practical value for the purposes of a challenge to an arbitral award. It is a distinction which is simply wrong and misleading so far as it concerns the consequences for the Parties; and it has no practical consequences at all for the purposes of this Court. I took careful note of what Mr. Galvao Teles said last Thursday (CR 91/3, p. 40), and he went so far as to say that the conceptual difference between an inexistent and an annulable award is reduced when, as in this case, a court has competence to decide the matter. I would go further. I would say the conceptual difference loses all validity. In short, "inexistence" is a notion quite inappropriate to an arbitral award. This perhaps explains why one finds no reference to this notion in the early work of the *Institute de droit international* on arbitral procedure, in 1875, or in the Model Rules on Arbitral Procedure adopted by the International Law Commission in 1958.

That concludes all I need to say on the first, general question. I must now turn to the second,

and quite specific question.

2. Was there a true majority in support of the Arbitral Award of 31 July 1989?

Mr. President, I think it is useful to start by noting one simple, but rather important fact: the President of the Tribunal, Mr. Barberis, signed the award. Of that there is no possible doubt.

What Guinea-Bissau contends, in essentials, is that Mr. Barberis did not really agree with what he had signed. This apparent participation in the "majority" of two is, we are told, quite misleading, for his separate declaration makes clear that he was not really part of that majority.

It must be apparent that, on this basis alone, the Court is being asked to make some extraordinary assumptions. Are we to assume Mr. Barberis is a fool, incapable of understanding what he was signing? We cannot make such an assumption. I do not know Mr. Barberis personally. No doubt some members of the Court do. But it is simply not possible to believe that a man of his experience and reputation, appointed by two sovereign States to preside over an arbitral tribunal, was such a fool as to sign an award he did not actually agree with.

Was he perhaps mesmerized by M. Gros? Now I do know M. Gros, as does almost everyone in this Court, and I would be the first to pay tribute to his qualities. But I am not aware that mesmerism is one of those qualities.

So simply on the face of it, it is difficult to accept Guinea-Bissau's argument.

The basis of the argument lies in the separate declaration by Mr. Barberis, so we need to look at that declaration with some care. There are, I suggest, three separate questions we need to examine. *First*, what *status* does a declaration have? In particular, does it carry any connotation of *disagreement* with the main award? *Second*, what did Mr. Barberis actually say in his declaration? And, *third*, did what he said signify disagreement with the essentials of the award? Let me examine those questions in turn.

(a) The status of a declaration

In its Counter-Memorial, paragraphs 142-160, Senegal has set out at some length the evidence it has found as to the practice of this Court, and of other Tribunals, in the matter of separate

declarations. I hope the Court has found this a useful exercise. Certainly there is no need for me to repeat everything we have said there. It may, however, assist the Court if I summarize the main conclusions we reached as to that practice.

In the Permanent Court the "decision", properly so-called, was embodied in the *dispositif*. Practice allowed the Judges to give a dissenting opinion, which had to be reasoned, and which clearly entailed lack of agreement with the *dispositif*. Or a Judge could give an individual opinion, also reasoned, but which meant that the Judge agreed with the decision - the *dispositif* - but for different reasons. Or a Judge could append a declaration. But this could register either agreement or disagreement. The title "declaration" had no clear connotation. One had to look at its terms to see whether, in the particular case, the Judge agreed or disagreed with the decision.

Under the present Court, "freedom of expression" for the Judges was sanctified by Article 57 of the Statute and Article 74, paragraph 2, of the Rules. To quote the latter in its original form:

> "Any judge may, if he so desires, attach his individual opinion to the judgment, whether he dissents from the majority or not, or a bare statement of his dissent."

That text was maintained, unchanged, in Article 79, paragraph 2, of the revised Rules of 1972. And the practice continued: individual opinions recorded agreement with the decision, dissenting opinions recorded disagreement; but "declarations" could go either way, and the term carried no fixed connotation.

However, from 1970 onwards a new trend developed. Judges voted with the majority, but then in a separate declaration indicated certain personal doubts as to the decision - the *dispositif* - itself.

Perhaps because of this trend, the 1978 Rules of Court, Article 95, paragraph 2, added this sentence: "a judge who wishes to record his concurrence or dissent without stating his reasons may do so in the form of a declaration".

This clearly suggests that declarations "can record agreement or disagreement". They differ from an opinion - whether individual or dissenting - in that declarations do not have to be reasoned.

From this it follows that, since declarations are not reasoned and can record agreement or disagreement, the crucial factor becomes whether the Judge's name appears amongst the majority of

those voting for the decision, in accordance with Article 95, paragraph 1. Perhaps because of this, since 1978 the frequency of declarations has declined. Declarations may nevertheless have a certain utility in that they may help to "clarify" a judgment or opinion. That was the view of this Court in the *Yakimetz* case *(I.C.J. Reports, 1987, Advisory Opinion of 27 May 1987*, pp. 45-46, paras. 49-51). But the *Yakimetz* Opinion contains no suggestion that a declaration necessarily implies disagreement: quite the contrary.

I make no comment on this practice in the Court, except to say this: a declaration has no fixed connotation. Since it can register agreement or disagreement there can be no presumption that a judge making a declaration does not agree with the decision. But where a judge adds his name to the majority, the inference that he agrees with the judgment is irrebuttable.

In the practice of arbitration tribunals "declarations" are less common, but not unknown. Such evidence as there is suggests, again, that they have no fixed connotation and that the essential test of whether an arbitrator agreed with an award lies in whether he signed, or did not sign, the award. A useful illustration is Advisory Opinion OC - 3/83 of the Inter-American Court of Human Rights, of 8 September 1983, concerning Restrictions on the Death Penalty. There you have an Opinion which expressly records the *unanimity* of the Court for all its findings. Yet there is a separate, very brief "opinion" so-called - really equivalent to a declaration - by Judge Reina of Honduras which has the sole purpose of proposing an alternative form of answer to one of the questions answered in the main Opinion. You could not have a clearer example of the practice whereby a *different* formulation of an answer does not imply disagreement with the answer formulated by the Court.

It is on the basis of this practice that, in its Counter-Memorial, Senegal has referred to the "primacy" of the majority vote in the decision-making process. We submit that what is conclusive is that vote. It is not open to a party to challenge that vote by saying "But look at the declaration by Judge so-and-so: he cannot be counted amongst the majority, despite his signature." This view - which has regard to the actual vote of a judge - has been criticized by Guinea-Bissau as "formalistic". I do not believe judges vote as a matter of form. Judges are fully aware of the

substantive implications of their vote. The vote is not a formal gesture, a mere token without content. The vote reflects a decision, a positive expression of the judge's will, and Senegal has never suggested otherwise. But let me be quite clear. Senegal does not suggest that we pay no attention to the content of a declaration. All we say is that, if the content of a declaration raises any uncertainty over whether a judge is with, or against, the majority, that uncertainty must be resolved by his actual vote.

Indeed, despite the many examples from the practice of this Court, of judges who have formed part of the majority but nevertheless attached separate declarations, no State party, to our knowledge, has ever challenged that majority. No State has ever suggested that this Court's Judgment was invalid because declarations made the majority suspect.

In fact, when one thinks about it, the Guinea-Bissau thesis puts judges in an impossible position. A judge cannot abstain. He must vote, one way or the other. But if he has some reservations about the decision, even though he broadly supports it, what is he to do? He can vote against it - an absurd position if he basically supports it. Or he can keep silent and say nothing of his doubts, but just sign the judgment or the award - a course some judges might feel to be intellectually dishonest, and scarcely consistent with their judicial duty. Or he can vote with the majority, and append a declaration explaining his doubts. But, says Guinea-Bissau, that raises the implication that he is not really part of the majority. In other words, Guinea-Bissau would treat a vote in support of the Award, but accompanied by a declaration, as equivalent to a *negative* vote. But that would be nonsensical.

Of course, I suppose one might say that, in such a case, the proper course would be to append, not a declaration but a separate opinion: for that would not be equivalent to a negative vote. But, clearly, judges have based their preference for a separate opinion over a declaration almost entirely on the length, or extent, of the separate reasoning they wished to express. A short statement could easily be accommodated by a declaration. It has never been assumed that, by appending a declaration, they raised an inference that their adherence to the judgment was false, or unreal.

(b) The content and meaning of the declaration by Mr. Barberis

I turn now to the second question. What, exactly, did Mr. Barberis say in his declaration?

Now for the convenience of the Members of the Court I have distributed the full text of this short declaration.

If you will turn to that text, you will see that it consists of three parts. He first gives the more precise answer to the first question posed by the *compromis* that he, Mr. Barberis, would have preferred. Then he explains that "this partially affirmative and partially negative reply" is, in his view, "the correct description of the legal position existing between the Parties".

And then he goes on to say *why* he preferred this partially affirmative and partially negative form of reply. To my mind, this is the significant phrase: "a reply of this kind would have enabled the Tribunal to deal in its Award with the second question put in the Arbitration Agreement".

What follows thereafter simply explains his purpose even more clearly. He believed that a partially negative reply to the first question - that is to say, an express statement that the 1960 Agreement did *not* apply to the economic zone and the fisheries zone - would have conferred on the Tribunal competence to delimit the economic zone or the fisheries zone.

From the text of the declaration itself we can deduce certain things with absolute clarity.

First, he had no quarrel with the substance of the decision itself. He agreed with the substance - the binding effect of the 1960 Agreement - entirely, and presumably that is why he signed it.

But, *second*, he would have preferred to have gone beyond that decision and answered the further question: what is the boundary for the economic zone or the fisheries zone?

As I explained earlier in dealing with the interpretation of the *compromis*, that further question was not asked. The reasons why it was not asked we have already examined. But, whatever the reasons, that question was not asked: of that there is no possible doubt.

So, in effect, what Mr. Barberis is saying is that he would have wished to go beyond the compromis and answer a question the Parties had not asked, but one which, evidently, he thought that they should have asked.

But in fact he did not do so. He shared the majority position, with a Judge of long

experience - André Gros of France - and we must therefore assume that he was persuaded by Gros of the need to restrict the answer to the actual question posed.

The decision, as such, remains scrupulously within the compromis; and Mr. Barberis agreed with that decision. His declaration is not, of course, part of the decision and it has no independent effect. He did not extend his declaration to the point at which he ventured an opinion on what the EEZ boundary might be. All he did, in his declaration - rather unwisely perhaps - was to admit that he would have wished to have gone beyond the question asked, although, I repeat, in the event, he did not do so.

There can be no doubt that he fully shared the decision. Even in the text of the declaration Mr. Barberis refers to his agreement with the *dispositif*. You will see on the second page of his declaration the phrase: "comme la sentence vient de le faire". So he had no quarrel with what was actually decided. But his agreement was not simply verbal; it goes to the very substance of the *dispositif* and I propose now to demonstrate this by comparing the decision and the declaration, and from this comparison it will be clear that Judges Gros and Barberis had *identical* views on the first question. So let us pose the next question.

(c) Did the declaration by Mr. Barberis in fact demonstrate disagreement with the decision?

This is clearly the crux of Guinea-Bissau's case. We need, therefore, to analyse very carefully the points of the disagreement which Guinea-Bissau alleges to find between the declaration and the decision.

The *first* lies in the view expressed by Mr. Barberis that the reply given to the first question could have been more precise. He says: "la réponse donnée par le Tribunal à la première question posée par le compromis arbitral aurait pu être plus précise". But, as Guinea-Bissau admits in its pleadings (at para. 174), a desire for more precision is not conclusive, for such precision could simply spell out, in clearer or more precise language, a full and complete agreement with the decision. We cannot equate precision with disagreement. So we have to look at what Mr. Barberis would have preferred the decision to say. And that brings us to the second point raised by Guinea-Bissau, which is Mr. Barberis's reply to the first question, which Guinea-Bissau alleges to be

different from the reply in the *dispositif*.

The answer given to the first question in paragraph 88 of the decision was in the following terms:

> "The Agreement concluded by an Exchange of Letters of 26 April 1960, and relating to the maritime boundary, has the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal with regard solely to the areas mentioned in that Agreement, namely the territorial seas, the contiguous zone and the continental shelf..."

Now, let us look at the way Mr. Barberis would have preferred to formulate that reply: you have the text before you. You will see that the only difference is this.

Paragraph 88 of the *dispositif* says the 1960 Agreement is binding, but only as to the territorial sea, the contiguous zone and the continental shelf.

In other words, it does not apply to the economic zone by *necessary implication.* Mr. Barberis does not want this to be left as a necessary implication. He wants to spell it out *expressly* by saying it "does not have the force of law with respect to the waters of the exclusive economic zone or the fishery zone".

So where, in *substance*, do they differ? The answer is, in substance, they do not differ at all. If one breaks down the questions which both forms of reply attempt to answer it can be seen that their difference is simply one of form.

- Does the 1960 Agreement bind? Both replies agree it does;
- Does it bind as regards the territorial sea, contiguous zone and continental shelf? Both replies agree it does;
- Does it bind as regards the economic zone or fishery zone? Both replies agree it does not.

So, in substance, we have *total* agreement. The only difference is one of form. As regards the non-application to the economic zone and fishery zone, paragraph 88 leaves this clear but implicit; Mr. Barberis wants it clear and *express*. So that is the only difference.

Now, as we have seen, Mr. Barberis had no quarrel with the majority finding as regards the 1960 Agreement - that is why he signed it. His only purpose in stating *expressly* that the 1960 Agreement did not apply to the economic zone was that he thought this partially negative answer

would have enabled the Tribunal to proceed to the second question.

There he contemplated a task which Article II of the compromis had not conferred on the Tribunal. He failed to grasp that this further question, which he was himself inclined to answer, had not been put.

However, it is the *dispositif* which establishes the award, not the declaration by Mr. Barberis. So his inclination to go beyond the questions posed in Article II of the *compromis* finds no reflection in the actual award, and I think it fair to add that Mr. Barberis did not, in his declaration, actually go on to give his own answer to this further question, the question of the exclusive economic zone boundary. He contents himself by saying that he would have preferred to have gone on and answered it, although, in the event, he does not.

Of course, Guinea-Bissau sees the position exactly in the reverse. In its Memorial (para. 183) Guinea-Bissau suggests that what prompted Mr. Barberis to make his declaration was his awareness that the *dispositif*, as it stood, was an *excès de pouvoir*; and that his declaration was essentially a way of objecting to this *excès de pouvoir*. That really credits Mr. Barberis with little sense. Surely, the simplest way to object to an excès de pouvoir is to say to Mr. Gros "that is wrong, and I am not going to sign it". It is beyond belief that he would sign the *dispositif*, believing it to be an excès de pouvoir, and then make his protest in a declaration - a declaration which, in substance, agrees with the *dispositif*.

So my submission is that the true position is simply this. We have complete agreement between Mr. Gros and Mr. Barberis over the *dispositif*. Mr. Barberis in his declaration confesses he would have liked to have gone further, and answered a further question - but in fact does not do so. So there is no *excès de pouvoir* in the *dispositif*, and none, in fact, in the declaration: just a hint that Mr. Barberis had been tempted to commit one.

I want, in closing, to relate this conclusion back to Guinea-Bissau's claimed remedy. We must remember that Guinea-Bissau claims to have the whole award set aside - whether in the form of a declaration by this Court that it is inexistent, or a declaraton that it is a nullity. We must also remember that this claim to set the entire award aside depends upon proof, by Guinea-Bissau, that

the award as it stands constitutes a *manifest* and grave prejudice to the rights of Guinea-Bissau.

I would request the Court to examine the logic of this claim by Guinea-Bissau in the light of this condition. Let us assume, for the sake of argument, that Guinea-Bissau is right, and that, having answered the first question affirmatively, the Tribunal should have gone on to answer this further question, the question of the EEZ boundary. Even if that were right, why seek to nullify, to set aside, the answer to the first question? After all, the Tribunal gave an answer to the first question, and there undoubtedly was a majority for that answer. So why nullify that answer? Where is the manifest and grave prejudice to Guinea-Bissau if the award is right so far as it goes, but does not go far enough?

If, in reality, Guinea-Bissau's real complaint is that the Tribunal should have gone on to deal with the EEZ boundary, why not reconvene the Tribunal and ask them to complete their task? Or, if that were not possible, why not request Senegal to agree that this further question - the question of the EEZ boundary - be put to a new tribunal? It seems absurd to nullify the one clear answer the Parties have received from the Tribunal. The answer, even if only partial, surely goes some way to helping the Parties resolve their difficulties. It surely assists, rather than gravely prejudices, Guinea-Bissau.

Mr. President, the answer to my question is all too clear. Guinea-Bissau does not like, *and refuses to accept* the Tribunal's answer to the first question. Despite the award, Guinea-Bissau refuses to accept that answer. That is what this case is all about.

Behind all this apparently sophisticated legal argument, Guinea-Bissau has one overriding aim: to overturn the Tribunal's answer to the first question.

I hope the Court will have no truck with this. That award is final and binding, and Guinea-Bissau must accept it. It is really an abuse of the process of this Court to go through this elaborate charade, trying to give a semblance of respectability to this refusal, by dressing it up as a claim to nullify the award.

Mr. President, that completes the pleading of Senegal during this first round. The Agent of Senegal, Mr. Thiam, will make his formal submissions at the end of our second round of pleading.

May I, in closing, express my appreciation of the patience of the Court.

The PRESIDENT: Thank you very much, Dr. Bowett.

Now, as I indicated before, some of the judges would like to ask questions and I think it would be convenient if we were to have a break here. In the circumstances, it might be as well if I said that the break will be for 15 minutes at least. Thank you very much.

The Court adjourned from 11.10 a.m. to 11.55 a.m.

The PRESIDENT: Please be seated. I apologize to the Agents and Parties for keeping them waiting somewhat longer than I said.

Now we come to the questions, and I call first on Judge Guillaume, please.

M. GUILLAUME: Monsieur le Président, je souhaiterais poser au représentant de la Guinée-Bissau la question suivante :

Dans sa plaidoirie, le Professeur Highet a mentionné deux cas dans lesquels des sentences arbitrales ont été considérées comme divisibles.

Il a ajouté que dans une "petite minorité" de cas, des sentences arbitrales ont été regardées comme indivisibles (CR 91/3, p. 47 de l'original).

A quels cas pensait-il ?

[Translation]

In his statement, Professor Highet mentioned two cases in which arbitral awards were held to be divisible.

He went on to say that, in a "small minority" of cases, certain arbitral awards had been considered indivisible (CR 91/3, p. 47).

Je vous remercie, Monsieur le Président.

The PRESIDENT: Thank you very much. Judge Shahabuddeen, please.

Judge SHAHABUDDEEN: Thank you, Mr. President.

I have three questions. The first is addressed to the distinguished representatives of Guinea-Bissau.

Last Wednesday Mme Chemillier-Gendreau submitted as follows:

> "The answer to the first question would have been conclusive only in the case, carefully verified, where the answer would have met the need for a settlement of the dispute as a whole" (CR 91/2, translation, p. 54; original, p. 63).

Does this statement imply that there was some possibility of the dispute being settled in its entirety by a reply to the first question only?

[Traduction]

Mercredi dernier, Mme Chemillier-Gendreau a déclaré:

"La réponse à la première question ne pouvait épuiser le débat que dans le cas, soigneusement vérifié, où cette réponse eût satisfait à l'exigence du règlement de l'ensemble du différend." (CR 91/2, p.63.)

Cela implique-t-il qu'il y avait une possibilité que le différend fût réglé dans son ensemble par une réponse à la première question ?

My second question is addressed to the distinguished representatives of Senegal.

In paragraph 7 of its Rejoinder in the Arbitration proceedings, Senegal said:

"By Article 2 of the Arbitration Agreement concluded on 12 March 1985, the Parties to the present proceedings have agreed that the boundary line drawn in 1960 extends to the whole of the continental shelf and the exclusive economic zones, unless the Arbitration Tribunal holds that the 1960 Exchange of Letters does not have the force of law in the relations between the Parties."

What were the particular terms of Article 2 on which Senegal was relying for saying that the Parties had so agreed? (The original French text opens with the words, "Aux termes de l'article 2 ...")

[Traduction]

Au paragraphe 7 de sa duplique dans la procédure arbitrale, le Sénégal a déclaré:

"Aux termes de l'article 2 du compromis d'arbitrage conclu le 12 mars 1985, les Parties au présent litige ont convenu que la limite tracée en 1960 s'étend à l'ensemble du plateau continental et des zones économiques exclusives, à moins que le Tribunal arbitral n'aboutisse à la conclusion que l'échange de lettres de 1960 ne fait pas droit entre les Parties."

Quels sont les termes particuliers de l'article 2 sur lesquels se fondait le Sénégal pour dire que les Parties en étaient ainsi convenues?

My third, and last, question is addressed to both sides and it is this:

In referring to the 1960 Agreement as one "which relates to the maritime boundary", does the first question indirectly refer to the line established by that Agreement?

[Traduction]

En se référant à l'accord de 1960 comme à un accord "relatif à la frontière en mer", la première question se référait-elle indirectement à la ligne fixée par cet accord?

Thank you.

The PRESIDENT: Thank you, very much. Judge Weeramantry has a question.

Judge WEERAMANTRY: Thank you, Mr. President.

I have just one question for both Parties.

If the Tribunal had held that the Agreement of 1960 was binding only in respect of the territorial sea but not in respect of the contiguous zone or the continental shelf, would that have been an affirmative or negative answer to Question 1?

[Traduction]

Si le Tribunal avait jugé que l'accord de 1960 n'était obligatoire que pour la mer territoriale, mais non pour la zone contiguë ni pour le plateau continental, cela aurait-il été une réponse affirmative ou négative à la question 1?

The PRESIDENT: Thank you. Are there any further questions? I think not. That concludes the questions asked by Judges.

As usual it will be for the distinguished Agents to decide whether these questions should be dealt with orally at the next round or perhaps they might prefer an answer in writing to be delivered as soon as reasonably possible, after the conclusion of the hearing.

So I think that concludes our business for this morning and the Court will adjourn, therefore, until tomorrow afternoon at 3 o'clock, when we shall hear the reply of Guinea-Bissau.

The Vice-President has reminded me that perhaps I should add that we shall hear Senegal in the morning of Thursday. There will be no public hearing on Wednesday.

Thank you.

The Court rose at 12.05 p.m.